14 S. E. 754), put great emphasis upon the subject of fraud—so much so that the reader, unless he examines the case carefully, may be lead to think that the court held that the fraud alone, independently of the express condition, would have avoided the policy.

What would be the effect of fraud in the absence of such a condition in the policy? Fraud on the part of the insured at the time of making the contract of insurance would render it void (*Moore* v. *Va. F. & M. Ins. Co.*, 28 Gratt, 508, 523. *Burruss* v. *National Life Assn.*, 96 Va. 543, 548-9), it would seem that fraud in the proof of loss could not produce this result.

G. C. G.

SOUTHERN RY. CO. v. GLENN'S ADM'R; GLENN'S ADM'R v. SOUTHERN RY. CO.*

Supreme Court of Appeals.

March 10, 1904.

TRUSTEE—COMPENSATION—ILLEGAL ALLOWANCE—INTEREST—APPEAL—PARTIES—STATUTE—MANDATE—MISNOMER.

1. Where a mandate of the Supreme Court of Appeals provides that the directions to the lower court contained therein shall be so carried out as not to conflict with the written opinion of the court, and, through inadvertence, names the person affected thereby as W. W. Glenn, as appears from a reading of the written opinion, in which the correct name of the person affected is shown to be John Glenn, the action of the lower court in making the mandate operative against John Glenn is not an amendment, but a construction, of the mandate.
2. Where a recital in a mandate of the Supreme Court of Appeals of the name of a person affected thereby was unnecessary, an inadvertent misnomer therein of such person will not vitiate the mandate as to the person intended to be named—the correct name appearing in the written opinion in the cause—but the name will be treated as surplusage.
3. Under Code 1887, section 3454, declaring that any person who is a party to any case in chancery wherein there is a decree or order adjudicating the principles of the cause, who thinks himself aggrieved thereby, may present a petition for an appeal from such decree or order, an appellant can only be one who is a party to the suit in the court below, and presents a petition for an appeal from such decree.
4. Where parties stand on distinct and unconnected grounds, their rights being separate and not equally affected by the same decree, the appeal of one on behalf of others will not bring up for adjudication the rights or claims of any but the one appellant.

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5. Where a trustee, under a reasonable belief that his right to extra compensation which he retained out of the receipts would never be an after-subject of controversy, continued in the faithful discharge of his duties for many years, and until his death, when appeals from the decrees of the court allowing the extra compensation resulted in requiring the amount to be returned to the trust on the admission of another party into the case as assignee of claims represented by counsel, who had, along with the court and the commissioner, assured the trustee that the extra compensation was justly his, interest will not be required to be paid thereon from the estate of the deceased trustee.

Buchanan and Cardwell, JJ., dissenting.

Appeal from Circuit Court, Henrico county.

Proceedings between the Southern Railway Company and John Glenn's administrator. From a decree permitting other creditors than one successfully appealing to participate in the benefit of the decision, the administrator appeals. *Reversed.*

From a decree denying interest on extra compensation illegally retained by the administrator's decedent, the railway company appeals. *Affirmed.*

Munford, Hunton, Williams & Anderson, for railway company.

McGuie & Riely, Chas. U. Williams, Chas. Biddle, and R. E. L. Marshall, for administrator.

HARRISON, J.:

These two appeals are from decrees in the same cause, and have been heard together here. They are the sequel to the cause of *Southern Railway Company* v. *Glenn's Administrator, etc.,* decided by this court in June, 1900, 98 Va. 309, 36 S. E. 395.

For present purposes the facts are sufficiently stated in the opinion of this court on the former appeal, and therefore need not be repeated. It was there decided that certain commissions allowed John Glenn, trustee, were in excess of his legal right, and for that error the decree complained of was reversed, and the cause remanded to the Circuit Court, with directions to disallow such additional compensation in settling the accounts of the trustee, as to the appellants in that cause.

In the mandate of this court on the former appeal, the name of

the trustee was inadvertently and erroneously recited as W. W. Glenn, instead of John Glenn. It is contended that this error renders the mandate void as against the estate of John Glenn, trustee; that for the Circuit Court to make the mandate operative against the estate of the trustee, John Glenn, would be for that court to amend the mandate of this court, which it has no power to do.

It is not competent for the Circuit Court to amend or correct the mandate of this court. We are ourselves powerless to amend or correct our own mandate after the term at which it was rendered has passed, and the time for a rehearing has expired. The question involved, however, is not the right of the court to amend, but its power to construe the mandate and declare its meaning. From a casual reading of the mandate, it is manifest that the recital of the name of the trustee was wholly unnecessary. The presence of the name of W. W. Glenn in the mandate takes nothing from its force. The order would have been complete and effective without it. The name of W. W. Glenn may therefore be regarded as surplusage which does not vitiate that which is otherwise good. Broom's Legal Maxims (7th Ed.) p. 626; *Laverty* v. *Moore,* 33 N. Y. 663; *Campbell* v. *Ayres,* 6 Iowa, 339. The mandate provides that the directions to the lower court contained therein shall be so carried out as not to conflict with the written opinion of this court. This practically makes the opinion a part of the mandate, and when the opinion is looked to, the meaning of the mandate is free from all doubt and difficulty. It there clearly appears that John Glenn was the trustee who had claimed and received the extra compensation, and the only trustee before the court when the additional compensation was allowed. The mandate and opinion, read together, further clearly show that it was the extra commissions allowed John Glenn, trustee, that were disallowed as to the claim of the appellants. Under these circumstances, it was not error in the Circuit Court to treat the misnomer as a mere clerical error, not affecting the substance of the mandate, which was clear and specific in its directions with respect to the disallowance of the extra commissions as to the appellants.

The administrator of John Glenn, late trustee, further assigns as error the action of the Circuit Court in holding that the term "appellants," as used in the opinion and mandate of this court

on the former appeal, embraced not only the Southern Railway Company, but all those creditors in whose behalf it claimed to sue. It is contended by counsel for the creditors that the expression "appellants in this cause" was intended to embrace, and did embrace, all of the creditors of the National Express & Transportation Company enumerated in the decree dated April 8, 1895, except the personal representative of W. W. Glenn, deceased, the Philadelphia, Wilmington & Baltimore Railroad Company, and the First National Bank of Charleston; it being insisted that all of said creditors were appellants on the former appeal, and entitled to participate in the benefits of the decision then made.

If this court had intended to order a general accounting for the benefit of all the creditors mentioned, its decree should have directed that the estate of the late trustee be required to account for all the extra compensation he had received, and return the same to the trust fund for the benefit of the creditors generally. This was not done. On the contrary the opinion and mandate on the former appeal expressly limit the benefits of the decree then made to the appellants in that cause. Therefore the question presented for our present consideration is, who were the appellants before this court on the former appeal?

The petition presented on the former appeal, which alone determines who were appellants, is in the name of the Southern Railway Company, suing for itself and in behalf of all other creditors of the defendant company. At the conclusion of the petition, immediately following the usual prayer for an appeal, is this statement: "The petitioners as above mentioned (except John M. Glenn, personal representative of W. W. Glenn, deceased, the Philadelphia, Wilmington & Baltimore Railroad Company, and the First National Bank of Charleston), being all the creditors enumerated in the last degree of dividends, to-wit, that of April, 1885, by the Southern Railway Company, suing for itself and in their behalf."

The doctrine of parties by representation and other rules of equity practice with respect to parties, are relied on and have been much discussed by counsel. These rules have, however, no application in determining who are appellants in a cause pending before this court. The benefit of appeal is a purely statutory right. When parties come to this court to have reviewed the action of a lower

court, their only warrant for doing so is the statute, and its terms must be strictly complied with. Section 3454 of the Code of 1887 declares that any person who is a party to any case in chancery wherein there is a decree or order adjudicating the principles of the cause, who thinks himself aggrieved thereby, may present a petition for an appeal from such decree or order. The person referred to in this statute has been decided to be such person as was a party to the suit in the court below, and who was aggrieved by the decree therein rendered; and, to make him a proper party to an appeal, these two circumstances must occur. Barton's Chancery Practice, p. 167, section 42; *Supervisors of Culpeper* v. *Gorrell, etc.*, 20 Gratt. 484-520.

A person desiring an appeal must present his petition therefor, accompanied by a copy of the record, to this court in session, or to one of the judges thereof. Whether or not an appeal be taken, rests entirely with the party affected by the decree of the lower court. No person can be forced by another party to the same suit to appeal against his will; hence the petition must show, by name, the parties who claim to be aggrieved by the decree complained of, and who desire to have such decree reviewed. Where there are a number of parties affected by the same decree, and they all desire to appeal, it is not necessary for each to present a separate petition. They can all unite by their respective names in one petition, and show thereby wherein each is aggrieved. A party can only show that he is aggrieved by joining in the petition. An appellant, therefore, is one who has presented his petition to this court for an appeal, showing that he is aggrieved, or has united with others in an appeal setting forth his grievance, by pointing out the error of the lower court. The rights of persons who have not appealed, and, indeed, who are not technically parties to the proceedings in the court below, may sometimes be finally determined by the judgment of this court; but that arises where the parties appealing and those not appealing stand upon the same ground, and their rights are involved in the same question, the decision of which must of necessity affect all alike. Where, however, the parties, as in the case at bar, stand upon distinct and unconnected grounds—where their rights are separate, and not equally affected by the same decree or judgment—then the appeal of one will not bring up for adjudication the rights or claims of the others. Barton's Ch. Pr. p. 167, section 42; *Walker's Ex'r* v. *Paige,* 21 Gratt. 636.

Parties not named cannot become appellants by virtue of a petition in the name of one person on behalf of himself and a number of others whose names are not mentioned. The only appellant in such a case is the person whose name appears in the petition. Those not named, on whose behalf the petition professes to be presented, are not recognized as appellants. This plainly appears from the writ issued by the experienced clerk of this court, wherein the appellee is summoned to answer the Southern Railway Company, "as to whom manifest error is said to have intervened to its damage, as shown by its petition. And whereas the Southern Railway Company upon its petition has obtained an appeal upon condition of its giving bond," etc. It is essential, as already seen, that the party appealing should be aggrieved, and the petition must set forth that grievance. This court must know at the time it makes its decree the names of the parties aggrieved, and the appellee is entitled to know against whom he is to defend, and to whom he is to look for the payment of costs in the event the appeal is decided against the appellant.

On the former appeal the name of the Southern Railway Company alone appears as petitioner, and it alone claims to be aggrieved by the decree of the lower court. If the decree complained of on the former appeal had been affirmed, there could have been no judgment for costs against any other party than the Southern Railway Company, and yet it is insisted that there were a large number of other persons who were appellants. This cannot be. If they would not have been responsible for the burdens, they cannot claim the benefits. There must be no uncertainty as to who are appellants, and hence those persons only who appear by name in the petition to this court can be recognized as such. Otherwise, upon a successful appeal, all would then wish to be treated as appellants, whereas, in case of failure, all would seek to avoid the consequences of defeat.

We are of opinion that the Southern Railway Company was the only appellant before this court on the former appeal, and therefore it was the only creditor entitled to the benefits flowing from that decision. This court had no jurisdiction, upon the petition and record formerly before it, to reverse the decree of the lower court in favor of creditors who did not appear as appellants, and its decree was not intended for their benefit.

The Southern Railway Company assigns as error the action of the Circuit Court in holding that the estate of John Glenn, the late trustee, was not chargeable with interest on the several amounts received by him as extra or additional commissions from the time such sums came into his hands until repaid into court in this cause.

The general rule undoubtedly is that he who has the use of another's money must pay interest upon it from the time he receives it until he repays it, unless there be an agreement, express or implied to the contrary. *Craufurd's Adm'r* v. *Smith's Ex'r,* 93 Va. 623, 23 S. E. 235, 25 S. E. 657. This rule is not, however, in equity, enforced without discrimination in every case. On the former appeal one of the claims of creditors was that the trustee should be charged interest on balances retained in his hands, upon the semi-annual settlement of his accounts, because the decree under which he was acting required him to pay any balances in his hands into the Planters' National Bank, to the credit of the court in the cause. This court held that the settlements of the trustee, reported to the court from time to time, showed that these balances had not been paid over as required; that no objection appeared to have been made to the action of the trustee in retaining in his hands such balances, but that during the many years the trustee was executing the trust, and until his death, the parties, as well as the commissioners who settled the accounts, and the court which approved and confirmed them, seemed to have concurred in the trustee's construction of the decree; and that he was not chargeable with interest on said balances. The extra or additional commissions were retained by the trustee under the express authority of decrees which declared that they were lawfully his. It is true that in the beginning the allowance of the extra commissions was objected to by one of the counsel for the creditors. This same counsel, however, in his deposition in the cause, says that he did not appeal from the decree allowing the commissions, because he wished the trustee to be fully compensated. For a number of years after the decree allowing the commissions was entered, the trustee made regular semi-annual settlements of his accounts, retaining the extra commissions without further question from any quarter. No one can read the record without being impressed with the general acquiescence by all parties in that allowance, nor fail to see that the trustee was thereby lulled into the belief that the extra com-

mission was his, and that no further question would be raised on that subject. We concur in the views so well expressed by the learned judge of the Circuit Court in disposing of this question. He says: "The Court of Appeals (98 Va. 320, 36 S. E. 395) has, *una voce,* approved the action of this court in rejecting a claim against the trustee for interest which had far higher merits than the claim for interest on these retained commissions. That claim was for interest an amounts reported by the trustee as in his hands, and not deposited, as he was authorized and required to do, to the credit of the court, in bank. This is a claim for interest upon moneys retained by the trustee under the authority of the court. That authority the Court of Appeals, after the lapse of many years, has said was not properly exercised, but nevertheless, until superseded or reversed, the trustee was authorized to regard his retention of these commissions as lawful and right. Not only this, but, while he was admonished that the right of the court to allow this extra compensation was made matter of question by a slumbering exception upon the record, he was assured all the time that, in the opinion of the court and counsel and commissioner, these extra commissions were, *ex æquo et bono,* his well-earned due. One of the counsel for all the creditors, Colonel Marshall, was pronouncedly of opinion that this extra allowance was not only equitably, but legally, his property. The only other counsel for creditors, the late Mr. Howard, who filed the exception to its allowance, in his deposition filed in this cause, states that he did not appeal from the court's action in allowing such compensation, because he wished the trustee to be fully compensated. Under a reasonable belief that his right to this extra compensation would never be an after-subject of controversy, the trustee continued in the faithful and efficient discharge of the duties of his trust until his death. And not until after his death, and the admission into the case of another party, the Southern Railway Company, as assignee of claims which had been heretofore, all through the progress of this litigation, represented by Col. Marshall and Mr. Howard, was there any suggestion of purpose to appeal from the decrees of this court."

The administration of this trust has involved a magnitude of labor and responsibility that rarely falls to the lot of a fiduciary. The collection and disbursement of its widely scattered assets has made necessary hundreds of suits all over the country. This cause,

in which the trust has been administered under the guidance of a court of equity, has extended over many years. The counsel who, from the beginning until a comparatively recent date, represented all of the creditors, have passed away. The learned and venerable judge who has throughout all these years presided over this litigation has, since the decrees now under review, sought retirement from a lifetime of judicial labor. This court has, by its former decision, awarded the Southern Railway Company its legal right, in requiring the estate of the late trustee to account for its proportionate share of the extra commissions retained. To allow the appellant now, under the facts and circumstances to which we have alluded, interest upon these several sums, would be a measure of relief not demanded by the law, and which would, in our opinion, result in great injustice to the trustee's estate.

In the view we have thus far taken of the case, it becomes unnecessary to consider other questions raised and elaborately discussed before this court.

For these reasons, the decrees complained of must be reversed in so far as they hold that any other creditor of the defendant express company than the Southern Railway Company is entitled to participate in the results of the former decision of this court, and in all other respects such decrees will be affirmed, with costs to the administrator of John Glenn, deceased, as the party substantially prevailing.

BUCHANAN, J. (dissenting):

I concur in the opinion of the court, except in so far as it holds that the Southern Railway Company is not entitled to interest on its *pro rata* share of the moneys improperly retained by Glenn, trustee, on account of commissions for his services. Upon that question I dissent.

It was determined by this court upon the former appeal (*Southern Ry. Co.* v. *Glenn's Adm'r,* 98 Va. 309, 36 S. E. 395) that the action of the lower court in allowing commissions to the trustee for his services beyond those provided by the deed of trust was unauthorized and illegal, except as to the creditors who assented to or acquiesced in such allowance. The railway company, or its predecessors in interest, having objected to such allowances when made, and having succeeded in having the decrees making them reversed and annulled, and its right established to its *pro rata* share thereof, I

know of no rule of law by which that company can be denied interest on the principal sum thus declared to be due it. Upon the former appeal it was held that it had not lost its rights by acquiescence, or by not appealing earlier than it did. If the objections made to such allowance in the year 1886 or 1887, and continued from time to time, in one form or another, until the decrees making them were reversed and annulled, were sufficient to preserve its right to the principal sum to which it was entitled, I am unable to see why they were not sufficient to preserve its right to interest thereon.

The courts of this State, with some aid from the Legislature, have established the doctrine that it is natural justice that he who has the use of another's money should pay interest on it. 4 Minor's Inst. 819, and cases cited; *Templeton* v. *Fauntleroy,* 3 Rand. 436, 446, 447; *Ross' Ex'r* v. *McLauchlan's Adm'r,* 7 Gratt. 86.

The fact that the trustee held the money under orders of court, made over the railway company's objection and in violation of its rights, which were afterwards reversed so far as they affected the railway company, cannot, in my judgment, affect the question of the right of the railway company to interest, any more than it can affect its right to the principal. Having succeeded, after long protracted and hotly contested litigation, in establishing its right to its *pro rata* share of the overpaid comissions, it seems to me that it is entitled to have interest on that sum during the many years the trustee has deprived it of the use thereof by improperly withholding the money and resisting its payment.

CARDWELL, J., concurs.

NOTE.—The effect of misnomer in the mandate of an appellate court is the first question considered by the court. The lower court is not warranted in refusing to obey the mandate of the appellate court for supposed judicial error therein—*Lore* v. *Hash,* 89 Va. 277, 15 S. E. 549; but where a mandate appears to have been framed on a misapprehension, it should not be strictly followed so as to work a manifest injustice, but it must be construed otherwise and reasonably—*Railroad Company* v. *Souter,* 2 Wall, 510, 3 Cyc. 488. And when the directions of the mandate are precise and unambiguous, it is the duty of the lower court to carry them into execution and not to look elsewhere for authority to change their meaning. But where there is some uncertainty and ambiguity in the mandate, the lower court has the right to resort to the opinion delivered at the time for assistance in expounding the mandate. *West* v. *Brashear,* 14 Pet. 51, 54; *In re Sanford etc. Co.,* 161 U. S. 247, 256; 13 *Am. & Eng. Encyc. Pl. & Pr.*

848. In view of these authorities and those cited by the court, it seems well established that clerical errors in the mandate may be corrected by the lower court, if such correction may be made by reference to the opinion of the appellate court. C. B. G.

OLD DOMINION S. S. CO. V. COMMONWEALTH.*

Supreme Court of Appeals.

March 17, 1904.

TAXATION—STEAMSHIPS—INTERSTATE TRAFFIC—ENROLLMENT OUTSIDE OF STATE.

1. Steamships owned by a foreign corporation, and enrolled outside of the state, and which are used mainly in transporting passengers and freight upon foreign tickets and bills of lading between points in the state to and from the ocean-going vessels of the corporation, have their legal *situs* for purposes of taxation within the state.

Appeal from Finding of State Corporation Commission.

The State Corporation Commission entered a finding on the —— day of November, 1903, declaring the steamers Mobjack, Accomack, Hampton Roads, Luray, Virginia Dare, Brandon, and Berkeley, the steam tug Germania, and seven barges, property of the Old Dominion Steamship Company, taxable under the laws of the state of Virginia, and imposing a property tax thereon for the year 1903. Said steamship company appeals. *Affirmed.*

Wm. H. White, for appellant.

The *Attorney-General,* for the Commonwealth.

The facts presented by the transcript of the record of the finding aforesaid are as follows:

That the Old Dominion Steamship Company was a nonresident corporation, having been incorporated by the Senate and House of Representatives of the State of Delaware. That it was then, and had been for many years theretofore, engaged in the transportation of passengers and freight on the Atlantic Ocean and communicating navigable waters, between the city of New York, in the State of New York, and Norfolk and certain other ports within the State of Virginia. That said steamship company in the prosecution of its said

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